Supreme Court, U.S.
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No. 01-__

IN THE

Supreme Court of the United States

ARCTIC SLOPE REGIONAL CORPORATION,
COUNCIL TREE COMMUNICATIONS, LLC, and
VOICESTREAM WIRELESS CORPORATION,
Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 525 of the Bankruptcy Code, 11 U.S.C. § 525, prohibits the Federal Communications Commission from canceling a radio spectrum license where the agency has determined, in an exercise of its regulatory authority, that such cancellation is necessary to ensure that licenses are granted to those most likely to use them efficiently for the benefit of the public.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners in this case are Arctic Slope Regional Corporation ("Arctic Slope"), Council Tree Communications, LLC ("Council Tree"), and VoiceStream Wireless Corporation ("VoiceStream"). Petitioners were intervenors in the proceedings below.

Arctic Slope is one of twelve regional corporations established by Congress under the terms of the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601 *et seq*. Arctic Slope has no parent corporations and no publicly-held company owns 10% or more of its stock.

Council Tree has no parent corporations and no publicly-held company owns 10% or more of its stock.

VoiceStream is a Delaware corporation that is wholly owned by Deutsche Telekom AG, a corporation organized under the laws of the Federal Republic of Germany.

Respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc. were petitioners in the proceedings below. The Federal Communications Commission and the United States of America were respondents below and are respondents in this Court pursuant to S. Ct. R. 12.6. The following entities were also intervenors below and are respondents in this Court pursuant to S. Ct. R. 12.6: BellSouth Corporation; BellSouth Cellular Corporation; Cellco Partnership dba Verizon Wireless; AT&T Wireless Services, Inc.; Cellular Telecommunications Industry Association; Dobson Communications Corporation; Sprint Spectrum L.P. dba Sprint PCS; TeleCorp PS, Inc.; and Nextel Communications, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Arctic Slope Regional Corporation, Council Tree Communications, LLC, and VoiceStream Wireless Corporation respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the District of Columbia Circuit is reported at 254 F.3d 130 and reproduced at page 1a of the appendix ("App.") to the petition for certiorari filed in this matter on this date by the Federal Communications Commission ("FCC") and the United States. The decision of the FCC is reported at 15 F.C.C.R. 693 (2000) and reproduced at App. 96a. The FCC's order denying reconsideration of that

decision is reported at 15 F.C.C.R. 17500 (2000) and reproduced at App. 52a.

JURISDICTION

The judgment of the D.C. Circuit was entered on June 22, 2001. App. 1a. On September 13, 2001, Chief Justice Rehnquist extended the time for petitioners Arctic Slope and Council Tree to file a petition for certiorari to and including October 19, 2001. On September 17, 2001, Chief Justice Rehnquist extended the time for petitioner VoiceStream to file a petition for certiorari to and including October 19, 2001. The jurisdiction of the D.C. Circuit was based on 47 U.S.C. § 402(b). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 309(j) of the Federal Communications Act provides in pertinent part:

> (j) Use of competitive bidding
>
> (1) General authority
>
> If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.
>
> * * *
>
> (3) Design of systems of competitive bidding
>
> For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a

> competitive bidding methodology. * * * In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote * * * the following objectives:
>
> (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public * * *;
>
> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses * * *;
>
> (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;
>
> (D) efficient and intensive use of the electromagnetic spectrum * * *. [47 U.S.C. § 309(j).]

Section 525 of the Bankruptcy Act provides in pertinent part:

> [A] governmental unit may not * * * revoke * * * a license * * * to * * * a person that is * * * a bankrupt or a debtor under the Bankruptcy Act * * * solely because such bankrupt or debtor * * * has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act. [11 U.S.C. § 525(a).]

Pertinent provisions of Title 47 of the Code of Federal Regulations are reproduced at App. 470-497a.

INTRODUCTION

This case asks whether the Federal Communications Commission is prohibited from carrying out its important statutory mandate to allocate licenses to the Nation's radio spectrum to those applicants which the FCC has determined are most likely to use the licenses efficiently for the benefit of the public. As expressly contemplated by Congress, the FCC determined that the public interest in ensuring the efficient use of the spectrum and the rapid deployment of vital new communications technologies is served by awarding certain licenses to those entities who value them most, as evidenced in part by their timely payment of license fees. Nevertheless, in conflict with the decisions of other Circuits, the D.C. Circuit has held that a licensee may frustrate that important regulatory mission by the simple expedient of declaring bankruptcy, and may thereby retain licenses which the FCC has determined are not in the public interest for that licensee to hold.

This case presents compelling grounds for certiorari. There is now a conflict among the Circuits regarding the interpretation and application of the Bankruptcy Code where a government agency has taken action against a debtor based on otherwise valid regulatory policies. That question, moreover, is of national importance, as it addresses the validity of one of the FCC's most important regulatory endeavors, involving control over licenses to a significant portion of the Nation's radio spectrum. Under the D.C. Circuit's decision, a single entity has been permitted to frustrate a regulatory policy and prevent the efficient use of spectrum licenses worth more than $15 billion. The Court should not permit a decision of such magnitude and importance to stand unreviewed.

STATEMENT OF THE CASE

Background. The FCC has exclusive authority to license users of the Nation's airwaves. Historically, the FCC awarded licenses for the use of the electromagnetic spectrum through comparative hearings and lotteries. Congress eventually concluded, however, that those methods of allocating licenses were "not serv[ing] the public interest." H.R. Rep. No. 103-111, at 248 (1993). Accordingly, in 1993, Congress amended the Communications Act of 1934 to require the FCC to award radio spectrum licenses in most instances "through a system of competitive bidding." 47 U.S.C. § 309(j)(1). In doing so, Congress acted on the belief that "[b]ecause new licenses would be paid for, a competitive bidding system will ensure that spectrum is used more productively and efficiently than if handed out for free." H.R. Rep. No. 103-111, at 249.

In authorizing competitive bidding, Congress directed the FCC to develop a methodology that promotes a number of objectives, including "the development and rapid deployment of new technologies, products, and services" and the "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. § 309(j)(3)(A), (D). Congress also directed the FCC to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people" by "disseminating licenses among a wide variety of applicants, including small businesses." *Id.* § 309(j)(3)(B). To accomplish this goal, Congress instructed the FCC to "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments." *Id.* § 309(j)(4)(A).

In 1994, the FCC adopted rules to auction licenses for broadband personal communications services ("PCS")—a new generation of mobile communications services, featuring new devices such as small, lightweight, multi-function porta-

ble telephones. *In re Implementation of Section 309(j) of the Communications Act, Fifth Report & Order*, 9 F.C.C.R. 5532 ¶ 3 (1994). In adopting such rules, the FCC explained "that the use of competitive bidding to award broadband PCS licenses, as compared to other licensing methods, would speed the development and deployment of new services to the public and would encourage efficient use of the spectrum," because "auctions would generally award licenses quickly to those parties who value them most highly and who are therefore most likely to introduce service rapidly to the public." *Id.* ¶ 5.

Seeking to fulfill its statutory mandate to promote small business participation, the FCC set aside two blocks of PCS licenses—the "C" and "F" Blocks—for bidding by entities with annual gross revenues and total assets below specified amounts. *Id.* ¶ 12. The FCC also decided to allow most successful bidders within those blocks to pay for their licenses in installments. *Id.* ¶ 16. To ensure that licenses remained in the hands of those who would put the spectrum to its best use, the FCC further decided that "[t]imely payment of all installments [would] be a condition of the license grant and failure to make such timely payment [would] be grounds for revocation of the license." *Id.* ¶ 138.

Respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc. (collectively, "NextWave") were formed in 1995 for the purpose of bidding on PCS licenses. At the FCC's C Block auctions in 1996, NextWave successfully bid on 63 licenses, bidding $4.74 billion in total. NextWave also successfully bid on 32 F Block licenses after submitting bids totaling a little more than $123 million. Under the FCC's rules, NextWave was permitted to pay for its licenses in installments. After the FCC awarded the C Block licenses, however, NextWave and other C Block bidders encountered difficulty obtaining financing. In response, the FCC temporarily suspended installment payment obligations for C Block licensees, and issued a series of

orders offering financially troubled licensees several payment restructuring options that allowed them to surrender some or all of their licenses for full or partial forgiveness of their outstanding debt.[1] The FCC did not allow bidders to retain their licenses for less than they had bid. Such a result, the FCC reasoned, would be "very unfair to other bidders," and would "gravely undermine the credibility and integrity" of the auction process. 12 F.C.C.R. 16436, ¶ 19. The FCC gave licensees until June 8, 1998 to elect an option, and until October 29, 1998 to resume installment payments.

NextWave's Bankruptcy Proceedings. Although many C Block licensees chose to avail themselves of a restructuring option and surrender licenses for which they could not pay, NextWave did not. Instead, on June 8, 1998, after failing to obtain stays of the election deadline from the FCC and the D.C. Circuit, NextWave filed a Chapter 11 petition for bankruptcy in New York. After declaring bankruptcy, NextWave made no installment payments on its licenses, nor did it ever seek permission to do so. Rather, NextWave sought to avoid its $4.74 billion license obligation as a "fraudulent conveyance" under Section 544 of the Bankruptcy Code, while at the same time retaining its licenses.[2]

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[1] *See In re Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report & Order & Further Notice of Proposed Rulemaking*, 12 F.C.C.R. 16436 (1997); *In re Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of Second Report & Order*, 13 F.C.C.R. 8345 (1998); *In re Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Order on Reconsideration of Second Report & Order*, 14 F.C.C.R. 6571 (1999).

[2] Section 554(b) of the Code allows the avoidance of "any transfer of an interest of the debtor in property of any obligation

Ruling in NextWave's favor, the Bankruptcy Court found that NextWave's winning bid exceeded the fair market value of the licenses at the time they were granted, and that a fraudulent conveyance had thus occurred. *NextWave Personal Communications, Inc.* v. *FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 277, 304 (Bankr. S.D.N.Y. 1999) (App. 301a, 357-358a). Consequently, the court avoided $3.72 billion of NextWave's $4.74 billion obligation to the FCC, ruling in effect that NextWave could keep its licenses for the reduced price of $1.02 billion. *Id.* The District Court upheld the Bankruptcy Court's decision.

The Second Circuit reversed. *FCC* v. *NextWave Personal Communications, Inc. (In re NextWave Personal Communications, Inc.)*, 200 F.3d 43 (2d Cir. 1999) (App. 213a). The court observed that the Bankruptcy Court had treated the matter as "a simple bankruptcy case," and the issues before it as concerning "solely the debtor-creditor relationship between the FCC and [NextWave]." *Id.* at 54 (quotations omitted) (App. 234a). That approach, the Second Circuit held, was "fundamentally mistaken." *Id.* (App. 235a). As the court explained, the FCC's "full and timely payment" requirement was "a regulatory condition for obtaining and retaining a spectrum license," and had "a regulatory purpose related directly to the FCC's implementation of the spectrum auctions"—"to ensure that spectrum licenses end up in the hands of those most likely to further congressionally defined objectives." *Id.* at 52, 54 (App. 229-230a, 235a). "NextWave's inability to follow through on its financial undertakings * * * indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the Licenses efficiently for the benefit of the public in whose interest they were granted." *Id.* at 54 (App. 234a). Thus, by permitting

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incurred by the debtor that is voidable under applicable law." 11 U.S.C. § 544(b).

NextWave to pay only $1.02 billion for licenses after it had bid $4.74 billion, the Bankruptcy Court had impermissibly "impaired the FCC's method for selecting licensees by effectively awarding the Licenses to an entity that the FCC determined was not entitled to them." *Id.* at 55 (App. 235a).

Upon remand, NextWave prepared a new plan of reorganization that provided for a single lump sum payment to satisfy its $4.3 billion outstanding obligation to the FCC. The Commission objected to the plan, however, pointing out that NextWave's C and F Block licenses had been automatically canceled when NextWave missed its first installment payment deadline. On January 12, 2000, the FCC issued a Public Notice announcing that NextWave's licenses would be reauctioned. *Public Notice, Auction of C and F Block Broadband PCS Licenses*, 15 F.C.C.R. 693 (2000) (App. 96a).

NextWave again sought relief from the Bankruptcy Court, which declared the FCC's cancellation of NextWave's licenses "null and void." *NextWave Personal Communications, Inc.* v. *FCC (In re NextWave Personal Communications, Inc.)*, 244 B.R. 253, 257 (Bankr. S.D.N.Y. 1999) (App. 134a, 135a). Among other things, the court concluded that the cancellation violated the Bankruptcy Code's automatic stay (11 U.S.C. § 362) and cure (11 U.S.C. §§ 1123, 1124) provisions. 244 B.R. at 266-269 (App. 155-163a). The court also indicated that the cancellation may have violated Section 525 of the Bankruptcy Code, *id.* at 269-271 (App. 163-168a), which provides in pertinent part that "a governmental unit may not * * * revoke * * * a license * * * to * * * a person that is * * * a bankrupt or a debtor under the Bankruptcy Act * * * solely because such bankrupt or debtor * * * has not paid a debt that is dischargeable in the case under this title." 11 U.S.C. § 525(a).

The FCC filed a petition for mandamus in the Second Circuit. In opposing mandamus, NextWave maintained that Section 525 "plainly prohibit[ed] the [FCC's] revocation of

NextWave's licenses." D.C. Cir. J.A. 1298. *See also id.* at 1255, 1298-1302.

The Second Circuit granted mandamus, holding that the Bankruptcy Court had once again impermissibly "interfer[ed] with the licensing decisions of the FCC." *In re FCC*, 217 F.3d 125, 139 (2d Cir. 2000) (App. 102a). The Bankruptcy Court, the Second Circuit observed, had concluded that the FCC's cancellation of the licenses "lack[ed] any comprehensible regulatory objective," and was "therefore simply the action of an ordinary creditor." *Id.* at 135 (quotation omitted) (App. 118a). As the Second Circuit explained, however, "the regulatory purpose for requiring payment in full—the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum—is quite obviously served in the same way by requiring payment on time." *Id.* (App. 119a). Thus, because "[t]here can be little doubt that if full payment is a regulatory condition, so too is timeliness," the FCC's decision to re-auction NextWave's licenses "implicate[d] the conditions of licensure, in itself a circumstance sufficient to require the bankruptcy's court's deference." *Id.* at 135-136 (App. 119a).

In the meantime, NextWave filed a petition asking the FCC to reconsider the cancellation of its licenses, arguing, among other things, that the cancellation violated the Bankruptcy Code. The FCC denied the petition, finding that the cancellation was "fully consistent" with Section 309 and its implementing regulations. *In re Public Notice DA 00-49, Auction of C and F Block Broadband PCS Licenses*, 15 F.C.C.R. 17500, ¶ 11 (2000) (App. 66a). As the Commission explained:

> NextWave is providing no service. The spectrum licensed to NextWave has gone unused since early 1997 and represents licenses in 90 markets across the United States. * * * NextWave's failure to utilize the spectrum and its attempts to shield the spectrum in bankruptcy have hindered the growth of innovative and competitive

> telecommunications services in many areas of the United States, to the detriment of the American public. [*Id.* ¶ 25 (App. 82a).]

The Commission also concluded that NextWave's Bankruptcy Code arguments, having been "summarily rejected by the Second Circuit," were "precluded under the doctrine of *res judicata*." *Id.* at ¶ 26 (App. 83a).

NextWave appealed the FCC's decision to the D.C. Circuit, which denied NextWave's motion to stay the FCC's re-auction of its licenses. Accordingly, beginning on December 12, 2000, the FCC held a new auction of those licenses, in order to award them to entities which, unlike NextWave, would satisfy the FCC's regulatory requirements. Petitioner Arctic Slope has a substantial interest in Alaska Native Wireless, LLC ("ANW"), which in the re-auction was awarded many of the licenses previously held by NextWave, subject to certain regulatory approvals. Petitioner VoiceStream was also awarded many of those licenses. ANW successfully bid over $2.7 billion, and VoiceStream successfully bid over $364 million, for licenses previously held by NextWave. Petitioner Council Tree participated in the proceedings leading up to the re-auction, and is a prospective participant in future FCC auctions. In total, successful bids for NextWave's licenses totaled more than $15.8 billion. On November 13, 2000, the D.C. Circuit granted petitioners leave to intervene in the proceedings below.

The Decision Below. On June 22, 2001, the D.C. Circuit invalidated the FCC's cancellation of NextWave's licenses. App. 2a. As a threshold matter, the court determined that it was not bound by the Second Circuit's mandamus decision under principles of res judicata. According to the D.C. Circuit, the Second Circuit's decision was exclusively jurisdictional in nature—"a decision about *where* NextWave's bankruptcy challenges should be decided, not *how* they should be resolved." App. 22-23a (quotation omitted;

emphasis in original). Thus, in the view of the D.C. Circuit, the Second Circuit had rejected NextWave's Bankruptcy Code arguments on the bizarre theory that the Bankruptcy Court lacked jurisdiction to construe a provision of the Bankruptcy Code. As the D.C. Circuit concluded, the Second Circuit "principally held that the Commission's license cancellation was a regulatory act reviewable only by a court of appeals under section 402 of the Communications Act, and thus that the bankruptcy court lacked jurisdiction to apply the Code to these acts." App. 24a. The D.C. Circuit thus held that it could consider anew NextWave's argument that the cancellation of its licenses contravened Section 525 of the Bankruptcy Code—an argument that NextWave had raised in the Second Circuit but upon which it had not prevailed.

Turning to the merits, the court held that the FCC's cancellation of NextWave's licenses violated Section 525 because—in its view—the Commission had cancelled NextWave's licenses "solely because" NextWave had not paid a debt dischargeable under the Code. In doing so, the court rejected the argument that the FCC had not cancelled NextWave's licenses "solely" because NextWave had failed to pay a dischargeable debt, but rather because (among other reasons) the FCC had determined that NextWave was not "the applicant most likely to use the Licenses efficiently for the benefit of the public." App. 45a (quotation omitted). The court acknowledged that "[i]t may be true, as the Second Circuit decided, that the Commission had a regulatory motive for examining NextWave's timely payment record and canceling its licenses on that basis." *Id.* Nevertheless, the court held that because NextWave's failure to make its payments was "the 'sole' trigger of the license cancellation," App. 45a, Section 525 applied even though the Commission had "acted for a regulatory purpose." 51a.

REASONS FOR GRANTING THE WRIT

I. THE D.C. CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

A "principal purpose" for which this Court grants certiorari is "to resolve conflicts among the United States courts of appeals." *Braxton* v. *United States*, 500 U.S. 344, 347 (1991). *See also* S. Ct. R. 10(b). The D.C. Circuit's decision below conflicts with decisions of other federal circuits, thus presenting a compelling case for certiorari. Whereas the D.C. Circuit disregarded the FCC's unchallenged regulatory purposes for canceling NextWave's licenses, other Circuits have held that the plain language of Section 525 permits action to be taken against a debtor where, as here, the debtor's bankrupt status or failure to pay a debt was not the *sole* reason for the action. The FCC's action was motivated by valid regulatory concerns—a determination that allowing NextWave to retain its licenses notwithstanding its financial difficulties would harm the public interest in ensuring the efficient use of the spectrum and the rapid deployment of critical communications technologies. Accordingly, under the test applied by the majority of Circuits—but not the D.C. Circuit—the FCC's action did not violate Section 525.

1. Most notably, the decision below conflicts with the reasoning and judgments of the Second Circuit on the same underlying facts. The Second Circuit squarely rejected NextWave's attempts to invoke the Bankruptcy Code as a basis for keeping its licenses without satisfying regulatory conditions imposed by the FCC. The D.C. Circuit reached the opposite conclusion.

In its initial decision, the Second Circuit set aside the Bankruptcy Court's fraudulent conveyance ruling. In that ruling, the Bankruptcy Court had treated the matter as "a simple bankruptcy case" concerning "solely the debtor-creditor relationship between the FCC and [NextWave]."

200 F.3d at 54 (App. 234a) (quotation omitted). That approach, the Second Circuit held, was "fundamentally mistaken." *Id.* (App. 235a). As the court explained, the FCC's auction rules "have primarily a regulatory purpose: to ensure that spectrum licenses end up in the hands of those most likely to further congressionally defined objectives." *Id.* The FCC "had used the willingness and ability of NextWave to pay more than its competitors as the basis on which it decided to grant the Licenses to NextWave." *Id.* (App. 234a). Thus, "NextWave's inability to follow through on its financial undertakings had more than financial implications." *Id.* Rather, "[i]t indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the Licenses efficiently for the benefit of the public in whose interest they were granted. It meant, *in regulatory terms*, that NextWave was not entitled to the Licenses." *Id.* (emphasis added).

Accordingly, the Second Circuit concluded that by permitting NextWave to retain its licenses while paying only a fraction of the amount required by the FCC, the Bankruptcy Court had impermissibly "impaired the FCC's method for selecting licensees by effectively awarding the Licenses to an entity that the FCC determined was not entitled to them." *Id.* at 55 (App. 235a). In effect, the Bankruptcy Court had "exercised the FCC's radio-licensing function." *Id.*

In its mandamus decision, the Second Circuit once again held that the Bankruptcy Court had impermissibly "interfer[ed] with the licensing decisions of the FCC," 217 F.3d at 139 (App. 128a), this time by declaring that the FCC's cancellation of NextWave's licenses violated the Bankruptcy Code and was therefore "null and void." *Id.* at 132 (App. 112a). As the Second Circuit saw it, the FCC's Public Notice of re-auction presented the question whether the Bankruptcy Court "could undo the consequences of NextWave's failure to fulfill the timely-payment requirement under the Licenses, as determined by the FCC." *Id.* at 134

(App. 116a). The Bankruptcy Court had concluded that the FCC's cancellation of the licenses "lack[ed] any comprehensible regulatory objective," *id.* at 135 (quotation omitted) (App. 118a), and was "therefore simply the action of an ordinary creditor." *Id.* That conclusion, the Second Circuit held, was at odds with the court's initial decision, which had "expressly deferred to the FCC's expert judgment as to the course that would best promote congressional objectives and serve the public interest." *Id.* (quotation omitted).

As the court explained, "the regulatory purpose for requiring payment in full—the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum—is quite obviously served in the same way by requiring payment on time." *Id.* (App. 119a). Thus, because timely payment is a "regulatory condition," the FCC's decision to re-auction NextWave's licenses "implicates the conditions of licensure, in itself a circumstance sufficient to require the bankruptcy's court's deference." *Id.*

The D.C. Circuit's decision below cannot be reconciled with these decisions. The Second Circuit plainly recognized that the Bankruptcy Code does not limit the FCC's exercise of its regulatory authority and does not permit a court to "interfer[e] with the licensing decisions of the FCC," 217 F.3d at 139 (App. 128a), or "impair[ ] the FCC's method for selecting licensees by effectively awarding the Licenses to an entity that the FCC determined was not entitled to them." 200 F.3d at 55 (App. 235a). In particular, the Second Circuit recognized that the FCC's full and timely payment requirement was a regulatory condition and that, so long as NextWave retained its licenses, its payment obligation was not a debt "dischargeable" in bankruptcy. *See, e.g.*, 200 F.3d at 56 (App. 237a) (recognizing that "[i]f the Licenses [were] returned to the FCC, the bankruptcy court [could then] resolve resulting financial claims that the FCC has against NextWave as it would the claims of any government agency seeking to recover a regulatory penalty or an obligation on a

debt"). The D.C. Circuit reached the opposite conclusion, holding that the Bankruptcy Code prevented the FCC from enforcing its full and timely payment condition and requiring that licenses be awarded to an entity that the FCC has determined is not entitled to them. That conclusion, moreover, was premised on the D.C. Circuit's characterization of the parties' relationship as "creditor-debtor," App. 50a, an approach the Second Circuit described as "fundamentally mistaken." 200 F.3d at 54 (App. 235a).

In seeking to avoid the preclusive effect of the Second Circuit's mandamus decision, the D.C. Circuit attempted to confine the Second Circuit's holding to jurisdictional grounds. According to the D.C. Circuit, the Second Circuit had simply held "that any arguments directly or collaterally challenging the Commission's regulatory actions—including arguments based on the Bankruptcy Code—must be brought in a court of appeals." App. 24a. That reading of the Second Circuit's decision is not tenable. The Second Circuit did not hold that the Bankruptcy Court had no jurisdiction to construe the Bankruptcy Code in resolving a controversy properly before it. Rather, the Second Circuit held on the merits that the Bankruptcy Code did not override the FCC's regulatory acts. For example, the Second Circuit quite clearly considered the merits of NextWave's arguments under the Code's automatic stay provision, 11 U.S.C. § 362. As the court held, that argument failed under the exception to the automatic stay for "an action or proceeding by a governmental unit * * * to enforce such governmental unit's or organization's police and regulatory power." *Id.* § 362(b)(4). If the Second Circuit had determined that the Bankruptcy Court lacked jurisdiction to consider "arguments based on the Bankruptcy Code," App 24a—as the D.C. Circuit believed—the Second Circuit would have had no occasion to conclude that this exception applied. Indeed, the D.C. Circuit recognized that the Second Circuit had decided that issue on the merits, holding that "issue preclusion bars NextWave from

relitigating the question of whether the license cancellation falls within subsection 362(b)(4)." App. 34a.

Any other interpretation would mean that the Second Circuit concluded that the Bankruptcy Court—a court specially created to handle bankruptcy matters—lacked jurisdiction to apply the Bankruptcy Code to decide a case or controversy properly before it. It would also mean that Section 525 (or any other provision implicated by agency action) could *never* be applied by a bankruptcy court where judicial review of an agency's action lies with the court of appeals. That is not, and cannot be, what the Second Circuit held, and its decision is therefore in conflict with that of the D.C. Circuit.[3]

2. The conflict created by the D.C Circuit's decision extends far beyond the clash with the Second Circuit. The D.C. Circuit concluded that the cancellation of NextWave's licenses violated Section 525 even though the FCC had valid regulatory reasons for canceling them other than NextWave's failure to pay its debt. The D.C. Circuit held that because

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[3] For largely the same reasons, the D.C. Circuit erred in holding that NextWave's Bankruptcy Code challenges were not barred by res judicata, which provides an additional reason for this Court to grant certiorari and reverse the decision below. NextWave argued both before the Bankruptcy Court and the Second Circuit that the FCC's cancellation of its licenses violated certain provisions of the Bankruptcy Code, including Section 525. As the Second Circuit itself observed, it "will grant a mandamus petition only where the petitioner's right to relief is " 'clear and indisputable.' " 217 F.3d at 134 (App. 115a). Accordingly, the court would not have granted such relief if NextWave's arguments had any merit, and the Second Circuit necessarily rejected NextWave's Bankruptcy Code arguments. Having litigated and lost on those grounds, NextWave was not free to reassert them in the D.C. Circuit. *See* App. 23a ("Claim preclusion prevents parties from relitigating issues they raised or could have raised in a prior action on the same claim.") (citing *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980)).

NextWave's failure to pay a dischargeable debt was "the 'sole' trigger of the license cancellation" the cancellation violated Section 525 *regardless* of whether the FCC also "acted for a regulatory purpose." App. 45a, 51a. *See also id.* at 45a (cancellation of NextWave's licenses violated Section 525 regardless of whether, "as the Second Circuit decided, * * * the Commission had a regulatory motive for examining NextWave's timely payment record and canceling its licenses on that basis"). In other words, the D.C. Circuit held that Section 525 is violated any time the failure to pay a dischargeable debt is a "but for" cause of a prohibited action against a debtor, even if there were other valid reasons for taking the action.

That holding not only ignores the plain language of the statute—which prohibits only actions taken "solely" because of a failure to pay a dischargeable debt—but is at odds with the decisions of other federal courts of appeals rejecting such an expansive application of Section 525. *See Exquisito Servs., Inc.* v. *United States (In re Exquisito Servs., Inc.)*, 823 F.2d 151 (5th Cir. 1987); *Laracuente* v. *Chase Manhattan Bank*, 891 F.2d 17 (1st Cir. 1989); *Comeaux* v. *Brown & Williamson Tobacco Co.*, 915 F.2d 1264 (9th Cir. 1990). These Circuits have held that the statute means what it says: that Section 525 does not prohibit an action motivated at least in part by concerns other than a debtor's bankrupt status or failure to pay a debt, because such an action is not taken "solely" because of a prohibited reason. In these circuits, unlike in the D.C. Circuit, an action does not violate Section 525 simply because the failure to pay may be a "but for" cause, where there were other valid reasons for the action.

In contrast to the D.C. Circuit below, the First, Fifth, and Ninth Circuits have followed "the better approach," *Exquisito Servs.*, 823 F.2d at 153, and have read Section 525 narrowly in accordance with its plain language and legislative purpose. In *Exquisito Services*, the Fifth Circuit expressly "adopt[ed] [a] narrow constructive approach" to Section 525 after

examining the divergent approaches taken by district and bankruptcy courts. *Id.* at 154. The court noted that some lower courts, focusing on the Bankruptcy Code's policy of providing debtors with a "fresh start," had construed Section 525 liberally. *Id.* at 153 (citing cases). Other courts, on the other hand, had construed the statute "more narrowly," "requir[ing] proof that the discrimination was caused *solely* by the debtor's status." *Id.* (emphasis added). This, the court reasoned, was "[t]he better approach," finding support in the plain language of the statute, as well as its legislative history. *Id.* Applying that rule, the court found that Section 525 had been violated because the evidence in that case showed that the Air Force had refused to renew a contract "solely because" the plaintiff had filed for bankruptcy and for no other reason. *Id.* at 154.

In *Laracuente*, the First Circuit agreed with the Fifth Circuit's interpretation of Section 525's plain language. There, the plaintiff alleged that she had been wrongfully discharged "solely because" she had filed for bankruptcy.[4] Like the Fifth Circuit in *Exquisito Services*, the First Circuit also observed that courts have split over the interpretation of Section 525. *See* 891 F.2d at 21-22 & n.2. The First Circuit noted that some courts had construed "solely because" liberally—to mean, for example, "played a significant role" or "but for"—reasoning that it would be difficult to prove that an entity had acted adversely against a debtor "solely because" the debtor had filed for bankruptcy, "rather than at least partially upon consideration of the financial circumstances of the debtor which led to the bankruptcy filing." *Id.* at 22 & n.2 (quotation omitted). But the First Circuit de-

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[4] Mirroring the language of Section 525(a), which applies to government agencies, Section 525(b) also prohibits private employers from "terminat[ing] the employment of, or discriminat[ing] with respect to employment against," a debtor "solely because" such debtor "is or has been a debtor" or "has not paid a debt that is dischargeable in a case under this title." 11 U.S.C. § 525(b).

clined to follow that approach because such a reading was contrary to the "plain language of the statute." *Id.* at 23. Applying that plain language, the court concluded that Section 525 had not been violated because although a draft employment evaluation had mentioned the plaintiff's economic problems, the employer had articulated a legitimate business reason, aside from the bankruptcy, for her termination. *Id.* Thus, the plaintiff's bankruptcy status was not the "*sole reason*" for her termination. *Id.* (emphasis in original).

In line with the First and Fifth Circuits, the Ninth Circuit has also adopted a narrow reading of Section 525. In *Comeaux*, the plaintiff alleged that an employer had violated Section 525 by failing to hire him because he had filed for bankruptcy. Citing the First Circuit's decision in *Laracuente*, the court emphasized that the plaintiff had to show "that one of the reasons for discharge enumerated in [Section 525] provided the *sole* reason for termination." 915 F.2d at 1269 (emphasis in original). Because the employer had indicated prior to making its final decision that it would not hire the plaintiff because of his credit history, "knowledge of the bankruptcy was clearly not the sole factor influencing" the employer. *Id.*

Thus, unlike the D.C. Circuit, these Circuits have recognized that Section 525 is not violated where an agency or employer acts for a reason other than those expressly enumerated in the statute. The D.C. Circuit, by contrast, adopted a "but for" approach, holding that the FCC's license cancellation violated Section 525 because "NextWave's failure to make its payments was "the 'sole' *trigger* of the license cancellation." App. 45a (emphasis added). That approach has been soundly rejected by the First, Fifth, and Ninth Circuits. *See, e.g., Laracuente*, 891 F.2d at 22-23 & n.2 (specifically rejecting "but for" test).

3. In refusing to construe the statute narrowly, the D.C. Circuit reasoned that such a "reading of section 525 would

allow governmental units to escape section 525's limitations simply by invoking a regulatory motive for their concern with timely payment." App. 45a. The First, Fifth, and Ninth Circuits, however, have rejected such a rationale for construing Section 525 more expansively, and for good reason. Where action is taken against a debtor based in part on otherwise valid concerns, such an action is not taken "solely" because of the failure to pay a debt. Here, Congress specifically charged the FCC with promoting "the development and rapid deployment of new technologies, products, and services," and the "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. § 309(j)(3)(A), (D). Carrying out that mission, the FCC found that "NextWave's failure to utilize the spectrum and its attempts to shield the spectrum in bankruptcy have hindered the growth of innovative and competitive telecommunications services * * * to the detriment of the American public." App. 82a. NextWave's licenses were thus canceled because it was not "the applicant most likely to use the Licenses efficiently for the benefit of the public," App. 45a (quotation omitted)—not "solely because" it had failed to pay its debt.

The reading given Section 525 by the First, Fifth, and Ninth Circuits is consistent not only with the statute's plain language, but also with its legislative history. Section 525 was intended to strengthen the Bankruptcy Code's policy against coerced reaffirmation of debts. S. Rep. No. 95-989, at 81 (1978). The Senate Report therefore observes that the statute "does not prohibit consideration of other factors, such as future financial responsibility or ability * * * if applied nondiscriminatorily." *Id.* Similarly, the House Report emphasizes that the

> prohibition does not extend so far as to prohibit examination of the factors surrounding the bankruptcy * * * or the examination of prospective financial condition or managerial ability. * * * [I]n those cases where the causes of a bankruptcy are intimately connected with the license,

> * * * an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate actions without running afoul of bankruptcy policy. [H.R. Rep. No. 95-595, at 165 (1978).]

The legislative history thus makes clear that when Congress said "solely" it meant what it said. *Cf. Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992) (Congress "says in a statute what it means and means in a statute what it says"). Congress did not intend to prevent a governmental unit from revoking a license where it has a valid reason for doing so that is not among those enumerated in the statute—even a reason "intimately connected" with the failure to pay a debt. H.R. Rep. No. 95-595, at 165. That includes not only lack of "future financial responsibility or ability," S. Rep. No. 95-989, at 81, but, as here, a regulatory finding that a debtor may not be "the applicant most likely to use the License[ ] efficiently for the benefit of the public." App. 45a (quotation omitted). That regulatory finding was unchallenged by either NextWave or the D.C. Circuit, and Section 525 is therefore inapplicable.

For these reasons, there is considerable disagreement among the Circuits as to the interpretation of Section 525, with the majority view decidedly against the D.C. Circuit. The FCC's authority to award licenses to those most likely to serve the public interest has been upheld by the Second Circuit and struck down by the D.C. Circuit. And the broader conflict over the interpretation of Section 525 extends to other circuits and potentially affects a wide range of governmental programs. *See infra* at 26-27. The interpretation of an important provision of federal law now varies depending on the happenstance of where a particular case is brought. The Court should therefore grant certiorari to ensure that federal law is applied uniformly throughout the Nation.

II. THE QUESTION PRESENTED IS IMPORTANT AND LIKELY TO RECUR.

The need for review in this case is heightened by the undeniable national importance of the question presented. Recognizing the importance of the FCC's role in regulating the Nation's communications system, this Court has often granted certiorari to decide questions of law affecting the FCC's regulatory authority.[5] This case—which affects the ability of the FCC to carry out one of its most important regulatory missions—is similarly of national importance. The electromagnetic spectrum is a scarce public resource, which Congress has directed the FCC to allocate in the manner the Commission determines will best serve the public interest. The D.C. Circuit has upset this important regulatory mission, holding that NextWave may retain licenses worth more than $15 billion notwithstanding the FCC's express determination—unchallenged by either NextWave or the D.C. Circuit—that allowing such retention disserves the public interest. Such an invalidation of a critical regulatory policy warrants this Court's review.

Working from the premise that those who value spectrum most highly are those most likely to put spectrum to its best use, Congress in 1993 amended the Communications Act to require competitive bidding for spectrum licenses in most instances, thereby expressing a strong national policy favor-

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[5] *See, e.g., United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 161 (1968) (granting certiorari "to consider [an] important question [concerning the FCC's] regulatory authority"); *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525, 527 (1959) (granting certiorari because questions presented were "important to the administration of the Federal Communications Act"); *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 123 (1945) (granting certiorari "[b]ecause of the importance of the contention that the State court's decision had invaded the domain of the Federal Communications Commission").

ing auctions as a method of license allocation. *See, e.g.*, H.R. Rep. No. 103-111, at 249 (1993) ("Because new licenses would be paid for, a competitive bidding system will ensure that spectrum is used more productively and efficiently than if handed out for free."). In doing so, Congress explicitly directed the FCC to develop a methodology that would promote a number of important governmental objectives, including the "development and rapid deployment of new technologies, products, and services for the benefit of the public," and the "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. § 309(j)(3)(A), (D).

The D.C. Circuit's decision severely threatens the ability of the FCC to fulfill this significant regulatory mission. To ensure that licenses end up in the hands of those who will put spectrum to its best use, the Commission made "full and timely payment of the winning bid" a regulatory condition for obtaining a license. 47 C.F.R. § 24.708(a). This condition applies to *all* licenses, not just to the hundreds which are currently held under installment payment plans. Under the D.C. Circuit's decision, however, the FCC cannot enforce this requirement where a winning bidder declares bankruptcy. As a result, valuable spectrum could be tied up for years in lengthy bankruptcy proceedings—as it has been here—impeding the "development and rapid deployment of new technologies, products, and services for the benefit of the public," and the "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. § 309(j)(3)(A), (D).

This situation is not limited to cases, like this one, where a licensee fails to make a timely installment payment. The FCC is statutorily obligated to ensure that a winning bidder is qualified to hold a license before granting it to the bidder. 47 U.S.C. § 309(j)(5). As a result, there is usually a delay between the close of an auction and the time that the bidder's payment becomes due. If a bidder were to declare bankruptcy after the auction and refuse to submit payment when it became due, under the D.C. Circuit's view Section 525

would prohibit the FCC from "deny[ing]" a license to the bidder. *See* 11 U.S.C. § 525(a) (governmental unit may not "deny" a license to a debtor solely because debtor has failed to pay debt dischargeable in bankruptcy). Given that the FCC continues to allocate licenses by auction, the D.C. Circuit's decision will continue to seriously impair the FCC's exercise of its regulatory authority.

Indeed, as the FCC has found, NextWave's "attempts to shield the spectrum in bankruptcy have hindered the growth of innovative and competitive telecommunications services in many areas of the United States, to the detriment of the American public." App. 82a. The D.C. Circuit has now sanctioned that result. As successful bidders in the re-auction, ANW and VoiceStream stand ready, willing, and able to utilize the licenses previously awarded to NextWave, while complying fully with their auction commitments and all other regulatory conditions. Yet as a result of the D.C. Circuit's decision, ANW and VoiceStream are unable to serve the public, while NextWave continues to allow spectrum worth more than $15 billion to lie fallow, thereby delaying or preventing the development of important new telecommunications technologies and services. The Court should not allow a decision of such magnitude to stand unreviewed.[6]

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[6] Numerous commentators have noted the potentially serious effect the D.C. Circuit's decision will have on the development of the Nation's telecommunications infrastructure. *See, e.g.*, Yochi J. Dreazon, *NextWave Ruling Jolts Wireless Industry*, Wall St. J., June 25, 2001, at A3 (decision "could delay the deployment of advanced new services such as highspeed wireless Internet access"); Stephen Labaton & Riva D. Atlas, *U.S. Court Upends Plans to Improve Cellular Service*, N.Y. Times, June 23, 2001, at A1 (court "threw into chaos plans to upgrade cell phone service across the country"); Jube Shiver, Jr. & Elizabeth Douglass, *NextWave Wins Latest Ruling Over Wireless Licenses*, L.A. Times, June 23, 2001, at C1 (decision "could slow the roll-out of the next generation of mobile phones"); Christopher Stern, *Judges Over-*

The D.C. Circuit's decision also has the unsavory effect of encouraging financially troubled bidders to use bankruptcy as "a sword rather than a shield." *In re James*, 198 B.R. 885, 888, 889 (Bankr. W.D. Pa. 1996) (concluding that Section 525 "must be construed narrowly rather than broadly"). Instead of surrendering licenses for which it cannot pay, a bidder could declare bankruptcy. From that vantage point it could seek to negotiate with the FCC over the amount of payment due or—as NextWave successfully managed to do here—convince the bankruptcy court to let it keep its licenses for a mere fraction of its bid. Such a blatant end run around the Commission's full and timely payment requirement is not only unfair to financially responsible bidders who either comply with that requirement or surrender licenses when they cannot pay for them, but damaging to the integrity of the auction process itself. Indeed, for precisely those reasons, the FCC decided not to allow financially troubled C Block bidders to retain their licenses for less than they had bid. *See supra* at 7.

Moreover, the implications of the D.C. Circuit's ruling are by no means limited to the FCC's auction program. Other federal agencies operate programs that allocate scarce resources through competitive bidding. Examples include the Bureau of Land Management, which awards coal, oil and gas, and other mineral leases, *see, e.g.*, 30 U.S.C. §§ 201, 226; 43 C.F.R. § 3508.11; the Bureau of Indian Affairs, which awards mineral leases on tribal lands, *see, e.g.*, 25 C.F.R. §§ 211.20; 212.20; and the Forest Service, which awards timber sales contracts. *See, e.g.*, 36 C.F.R. § 223.100. Such leases and contracts are subject to cancella-

turn Airwave Auction; Ruling on $15 Billion Sale Stalls Wireless Firms, Wash. Post, June 23, 2001, at E1 (court "upset plans to expand mobile phone services in cities across the United States"); *D.C. Circuit Remands FCC Decision to Cancel NextWave Licenses*, 15 Mobile Communications Report 1, 1 June 25, 2001 ("[r]epercussions of decision are expected to be wide-ranging").

tion for violations of applicable law or their terms. *See, e.g.*, 30 U.S.C. § 188; 25 C.F.R. §§ 211.54, 212.54; 36 C.F.R. § 223.116. And hundreds of federal and state agencies award many billions of dollars of vital government contracts conditioned in part on timely payment requirements. Under the D.C. Circuit's decision, however, an agency will not be able to cancel a lease or contract where a debtor defaults on a payment obligation, even if the agency—like the FCC here—reasonably determines in an exercise of its regulatory authority that cancellation is necessary to ensure that precious resources are put to their best use.

Finally, the fiscal impact of the D.C. Circuit's decision itself militates in favor of certiorari. *See, e.g., United States* v. *Mitchell*, 463 U.S. 206, 211 n. 7 (1983) (noting size of $100 million judgment against the government as reason for granting review). NextWave bid over $4.8 billion for its licenses, and as a result of the D.C. Circuit's decision it is by no means certain that the Federal Government will recover all or even most of that amount. Moreover, NextWave's licenses sold at re-auction for over $15 billion—more than three times what NextWave bid for them. Accordingly, even if the FCC were to recover all of the amount bid by NextWave, the D.C. Circuit's decision means the loss of over *$11 billion* to the public fisc. This revenue has already been "scored" for the 2001 federal budget,[7] and its loss alone makes this case one of national importance.

[7] *See* Office of Management and Budget, *2002 Budget of the United States Government*, Table 22-1: Budget Authority by Function, Category, and Program, at 161.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

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